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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 370.

MAGNESIUM CASTING COMPANY.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF TERMINAL FREIGHT COOPERATIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

INTEREST OF THE AMICUS CURIAE.

Terminal Freight Cooperative Association (herein called "Terminal"), is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments of freight from its members, consolidates such shipment into carload lots in order to secure the advantage of lower costs through large volume shipment, and reships such goods to

members' plants and other facilities at locations throughout the United States.

Terminal is currently engaged in proceedings in the United States Court of Appeals for the Eighth Circuit (*Terminal Freight Cooperative Assn., et al.* v. *Solien*, Nos. 20462, 20472), and for the Third Circuit (*Terminal Freight Cooperative Association, et al.* v. *NLRB*, No. 18948) whose decisions will involve an interpretation of the very same statutory provision as does the instant case and, like the present case, raises questions concerning the manner and content of the Board's duty to review its agents' disposition of unfair labor practice cases.

In the present case, the petitioner has been denied any review of an adverse unfair labor practice ruling by the National Labor Relations Board in which the Board would have access to the record in the case and could make independent findings of fact as are specifically required by the language of Section 10(c) of the National Labor Relations Act. In Terminal's pending Eighth Circuit case a regional director has approved a settlement agreement purporting to remedy unfair labor practices perpetrated against Terminal without incorporating any findings of fact in that agreement. The "record" which will go to the Board for its "review" of the appropriateness of that settlement agreement will neither contain any such findings by the regional director nor any other material from which the Board may make independent findings of fact. Yet, Section 10(c) of the Act, which governs and describes the manner in which the Board shall review the disposition by its agents of all unfair labor practice cases, requires precisely such independent findings of fact by the Board.

Thus, in Terminal's Eighth Circuit case, because of the paucity of the "record" before it, the Board will make no such findings nor meaningfully review the propriety of the

disposition there of the unfair labor practice case. In the instant proceeding the Board has refused to accord such review and make such findings because of its "rule against relitigation". In both cases the requirements of Section 10(e) would seem to require the Board to do so.

In Terminal's Third Circuit case the regional director determined that a complaint based upon Terminal's unfair labor practice charges should issue. Thereafter he delayed its issuance while seeking to settle the underlying case and without revoking his decision that the charges had merit. Ultimately the regional director approved a unilateral settlement over Terminal's objections. The settlement agreement contained no findings of fact. Terminal sought to appeal the director's action to the Board and to avail itself of the guarantee provided in Section 10(e) of an independent review by the Board of the director's acts. The Board refused to review the propriety of the director's conduct contending that the case was not properly before the Board for review. In its brief the Board indicated that even if the case were properly lodged for review, the nature of the review the Board would accord would not meet the standards set out in Section 10(e).

Terminal believes that this Court's decision interpreting the scope of Section 10(e) of the Act in this case will control, or surely affect, the disposition of the Third and Eighth Circuit cases.

This brief is submitted in order to apprize this Court of some of the ramifications of its decision herein and in an effort to persuade this Court of an interpretation of Section 10(e) which does justice to the terms of the statute itself, to Congress' purpose in enacting it, and to the requirements of logic and equity as they relate to all of those cases.*

* This brief is filed with the written consent of counsel for both parties in accordance with Rule 42(2) of the Court.

ARGUMENT.

This case presents the question as to whether the Board's rule barring the consideration and review in unfair labor cases of issues previously litigated in representation cases constitutes an impermissible infringement of rights granted in Section 10(c) of the Act.

This question arises as a result of an inherent conflict between the proposition that the Board may refuse to review the record or consider the merits in an unfair labor practice proceeding of a decision made in a representation case on which decision the Board then relies in finding the existence of an unfair labor practice, with the inconsistent proposition that under Section 10(c) of the Act the Board's conclusion that an unfair labor practice has been committed "shall" be based on *its* review of "the preponderance of the testimony" and "shall" be supported by "*its* [the Board's] findings of fact . . .".

I. THE "RULE AGAINST RELITIGATION".

In 1959, the National Labor Relations Act was amended by the addition of the following language to Section 3(b) of the Act, 29 U. S. C. § 153(b):

> ". . . The Board is also authorized to delegate its regional directors its powers *under Section 9* to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board *may* review any action of a regional director,

delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director." (Emphasis added.)

Thus, and for the first time in 1959, the Board was authorized to exercise a discretionary review of decisions made by regional directors in representation cases, pursuant to the expressed right to delegate the decision-making powers under Section 9. Since Section 9 applies only to representation cases, the terms of this amendment neither authorized the Board to delegate any of its decision-making functions or responsibilities in unfair labor practice cases nor to limit its duty to accord plenary review in such cases.

The Board gave effect to the amendment of Section 3(b) by establishing a limited standard for reviewing representation decisions of its regional directors. (Rules and Regulations, § 102.67(c), 29 C. F. R. § 102.67(c)):

> "The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for the reconsideration of an important Board rule or policy."

This limited standard of review is intertwined with the fact that a regional director's decision in a representation pro-

ceeding "shall be final", subject to the Board's granting the complaining party's request for review, the filing of which, however, "shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director". (Rules and Regulations § 102.67(b), 29 C. F. R. § 102.67(b).)

In promulgating this restricted standard of review *in representation cases* arising under Section 9, the Board acted within the ambit of the authority expressly conferred by Congress in its amendment to Section 3(b).

However, the Board, having created that standard, proceeded to apply it as well to the review of unfair labor practice cases arising by virtue of Sections 8 and 10 of the Act. Accordingly, in § 102.67(d) of its Rules and Regulations, the Board provided that:

> ". . . Failure to request review [of decisions in representation cases] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. . . . Denial of a request for review . . . shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The effect of this extention of the specific authority conferred by Congress in the amended Section 3(b) of the Act was to deny review by the Board in cases arising under Section 10 to all parties who failed to obtain review in related cases under Section 9 pursuant to the restrictive certiorari-like tests established in § 102.67(c) for such representation cases. Thus the Board has administratively amended both Sections 3(b) and 10(c) of the Act.

II. THE BOARD'S FAILURE TO ACCORD MANDATORY PLENARY DE NOVO REVIEW IN ALL UNFAIR LABOR PRACTICE CASES IS INCONSISTENT WITH THE REQUIREMENTS OF THE NATIONAL LABOR RELATIONS ACT, THE BOARD'S OWN RULES AND REGULATIONS AND THE ADMINISTRATIVE PROCEDURE ACT.

The procedure prescribed by Congress for the Board's review of unfair labor practice cases is set out in Section 10(c) of the Act and makes no special provision for cases raising issues which were previously litigated in a representation case. That Section requires the Board, without stated exception, to review the entire record of the case before it, to form an independent (*i.e.*, de novo) opinion as to the direction of the preponderance of the evidence, and to frame and issue its own findings of fact. In view of the scope of this absolute direction, the decision of a trial examiner which is to be reviewed by the Board constitutes merely a "proposal" or "recommendation".

The Board's own Rules and Regulations recognize this absolute right to review by the Board of unfair labor practice cases. A trial examiner's "recommendation" becomes final only "in the event no timely or proper exceptions are filed". (Rules and Regulations § 102.48.) In all other events, merely upon the complaining party's filing timely and proper exceptions to the trial examiner's "decision or to any other part of the record or proceedings . . .", the Board will either: (i) "decide the matter forthwith, *upon the record*" (emphasis added), (ii) decide the matter after oral argument, (iii) reopen the record to receive further evidence "before a member of the Board or other Board agent or agency", (iv) "close the case upon compliance with recommendations of the trial examiner", or (v) "make other disposition of the case". (Rules and Regulations § 102.46(a); 102.48(b).)

Thus, without regard to the Board's *standard* of review in unfair labor practice proceedings, it is clear that such review will *always* be granted a party thereto as a matter of right. This conclusion is reinforced by the Board's Statements of Procedure § 101.12(a), 29 C. F. R. § 101.12(a), which provides that where a party:

> "... files exceptions to the trial examiner's decision, the Board ... reviews the entire record ... [and] issues its decision and order ... The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action."

And, upon the filing of the trial examiners' decision with the Board, an order is automatically entered transferring "the case" to the Board. (Rules and Regulations § 102.45(a), (b), 29 C. F. R. § 102.45(a), (b).)

The view that Section 10(c) of the Act requires the Board to accord not merely plenary but also de novo review in all unfair labor practice cases has become well established by courts which have interpreted that Section. As this Court stated in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 492 (1951):

> "The Court of Appeals deemed itself bound by the Board's rejection of the examiner's findings because the court considered these findings not 'as unassailable as a master's'. 179 F. 2d at 752. They are not. Section 10(c) of the Labor Management Relations Act provides that 'If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact ...' 61 Stat. 147, 29 U. S. C. (Supp. III § 160(c), 29 U. S. C. A. § 160(c)). The responsibility for decision thus placed on the Board is

> wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous'. Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."

To similar effect, with respect to the duty imposed by Section 10(e) on the Board, are *NLRB* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 454 (CA 3, 1950): "The Board retains its normal obligation to examine the record and reach its own independent conclusions"; *NLRB* v. *Pugh & Barr, Inc.*, 194 F. 2d 217, 220 (CA 4, 1952), holding that an obligation is imposed on the Board independently to examine the record when a complaining party filed proper exceptions; *Frito Co., Western Division* v. *NLRB*, 330 F. 2d 458, 463 (CA 6, 1964): "The Board cannot fulfil its obligation to uphold the purposes of the Act if it conceives itself powerless to exercise an independent examination of the record of the case presented by the General Counsel"; *S. D. Warren Co.* v. *NLRB*, 342 F. 2d 814, 816 (CA 1, 1965), cert. den. 383 U. S. 958 (1966), where the court held that while the manner of the Board's consideration of evidence in unfair labor practice cases may not be subject to judicial inquiry, the evidence must be considered so that "the administrative body can and does make the necessary findings"; and *Leeds & Northrup Co.* v. *NLRB*, 357 F. 2d 527 (CA 3, 1966), where the court held that whenever an unfair labor practice complaint is issued the statutory scheme contemplates that the Board will accord an independent review of the disposition of the case by the Board's agents at the inferior levels.

The interpretation of Section 10(e) for which the *amicus* argues in this brief finds further support from the provisions of the administrative Procedure Act ("APA"), 5 U. S. C. A. §§ 556, 557. These provisions have particular relevance as an aid in interpreting Section 10(e) since unfair labor practice proceedings under the Labor Act have

been held to be within the coverage of the APA. (*NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170 (CA 2, 1965), cert. den. 384 U. S. 972 (1966); *NLRB* v. *Miami Coca Cola Bottling Co.*, 360 F. 2d 569 (CA 5, 1966)).

The APA provides the following procedural guarantees, all of which are consistent with the view that Section 10(c) affords plenary, de novo review by the Board, and all of which are eliminated by the application by the Board of the "rule against relitigation" in any unfair labor practice cases:

(1) The right to a hearing at which "the proponent of a rule or order [has] . . . the burden of proof". (5 U. S. C. A. § 556(d));

(2) An opportunity, prior to decision, to submit for the consideration of the officers participating in such decision proposed findings or conclusions (5 U. S. C. A. § 557(c));

(3) The unqualified right to have the ultimate record in the case reveal the ruling upon and basis for each finding or conclusion made (5 U. S. C. A. § 557(c)):

> "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record . . .";

(4) The right to have presiding at the taking of evidence either the agency, one or more members of the body which comprises the agency, or one or more independent hearing examiners appointed as provided in Section 11 of the APA (5 U. S. C. A. § 556(b));

(5) The right to have the same officer who presided at the reception of evidence make the recommended or initial decision. (5 U. S. C. A. § 557(b).)

(6) Assurance that the deciding officer shall not consult with any person on any fact in issue unless upon notice and opportunity for all parties to participate. (5 U. S. C. A. § 557(b).)

Predictably, the National Labor Relations Act, and the Board's Rules and Regulations dealing generally with procedures in unfair labor practice cases, duplicate many of the safeguards guaranteed in the APA. Thus, for example, Section 10(c) imposes upon the General Counsel the burden to prove the commission of unfair labor practices by "the preponderance of the testimony taken"; the Board's Rules give any party the right to file proposed findings and conclusions with the trial examiner before he renders a decision (§ 102.42); and the statutory scheme contemplates that the same trial examiner who hears the evidence will make a recommended decision to the Board.

It is for all these reasons anomolous, at best, for the Board to apply its "rule against relitigation" in those unfair labor practice cases involving issues which were decided in a prior related representation case. Such conduct by the Board represents impermissible delegation to its regional directors of its responsibilities—a delegation which is without authorization either in Section 3(b) or in any other Section of the Act. It violates the unqualified duty imposed by Section 10(c) and by its own Rules and Regulations which prescribe the procedures to be followed in *all* unfair labor practice cases. And it violates the safeguards guaranteed in the APA which include the right to a hearing in the unfair labor practice case itself at which testimony is taken; at which the General Counsel has the burden of proof; at which a trial examiner will hear the evidence, accept proposed findings, and make his own findings; and for a de novo review from the ultimate source of administrative authority (the Board) which is obliged to make and justify its independent findings and conclusions.

III. DISCUSSION OF FACTORS CITED IN FAVOR OF APPLICATION OF "RULE AGAINST RELITIGATION" IN UNFAIR LABOR PRACTICE CASES.

The principle justification for the application of the "rule against relitigation" to unfair labor practice cases consists in Congress' alleged delegation to the Board, in the 1959 amendment to Section 3(b), of the authority to sub-delegate its decision-making duty in such cases to its regional directors.

The difficulties with this argument, as have been shown, are that Section 3(b) is expressly made applicable to cases arising under Section 9, which would not include unfair labor practice cases, and that the duties imposed on the Board under Section 10(c) are stated in absolute and unqualified terms. Moreover, nothing in the legislative history reveals any Congressional purpose to amend Section 10(c) when it amended Section 3(b).

A. Congressional Purpose and the Legislative Scheme.

The Congressional debates preceding the amendment of Section 3(b) revealed a purpose to expedite Board procedures. But which procedures? The remarks of Senator Goldwater, a member of the Conference Committee which had proposed this amendment, revealed its purpose to be "to expedite final disposition of cases by the Board, by turning over part of its caseload to the regional directors for final determination." The Senator then clarified his general reference to "cases" by specifying that he had in mind ". . . contested representation cases". (2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856 (2) (1959)). The combination of this delegation of representation case authority with the additional authority to permit the Board to limit its review

of the regional directors' resulting representation decisions did achieve the desired "expedition." It is, therefore, unnecessary, in order to find such expedition, to extend the scope of the matters delegated beyond the decision in and review of representation cases, to which cases Senator Goldwater and Section 3(b) exclusively and specifically referred. Moreover, had Congress intended its amendment of Section 3(b) to affect the absolute duty which it had previously imposed on the Board in Section 10(c) to review the disposition of unfair labor practice cases, then it is reasonable to assume that Congress would have effected such a further amendment.

Another basis for doubting that Congress intended its amendment to Section 3(b) impliedly to qualify the rights granted in Section 10(c) traces to the substantial differences between the two kinds of cases. Whereas representation cases are specifically stated to be "nonadversary in character" (Board's Statements of Procedure § 101.20(c)), the unfair labor practice case results in a permanent injunction by the Board with the possibility of subsequent contempt sanctions. Further, while the burden of proof in an unfair labor practice complaint case is upon the General Counsel to establish his position by a preponderance of the evidence, there is no burden whatever upon the Board or its agents in representation proceedings, so long as it is shown that "a question of representation exists". (Section 9(c)(1) of the Act). Indeed, it is typical in representation cases for the employer to present its witnesses first in view of their greater familiarity with the operations of their business even when the case is filed by a union. No finding is made in representation cases that any party has sustained any evidentiary burden. Nor does the Board, in a related subsequent unfair labor practice proceeding limited, by the "rule against relitigation", to the findings in the representation case, make any judgment as to whether

the General Counsel sustained any burden of evidentiary proof in accordance with the standard contained in Section 10(c). (For an account of other critical differences in the safeguards afforded in the two types of Board proceedings see *Utica Mutual Insurance Company* v. *Vincent*, 375 F. 2d 129 (C. A. 2, 1967), cert. den. 389 U. S. 839 (1967); and *American Automobile Association* v. *Squillacote*, 310 F. Supp. 596 (D. C. Wisc., 1970)). It follows, therefore, that since Congress, in Section 10(c), established a party's right to plenary, de novo review by the Board of unfair labor practice proceedings in which substantial procedural safeguards were afforded, that Congress would not deliberately have eliminated the right to such review of other such proceedings in which no comparable safeguards were provided—without saying so precisely and directly by an explicit amendment of Section 10(c).

Indeed, Section 10(c) represents tangible evidence of Congress' desire to afford the fullest independent review by the Board of the disposition of its Complaints in unfair labor practice cases. The effect of the Board's "rule against relitigation" is to deprive parties of just such an independent review; pursuant to its certiorari-type standards the Board does not review the merits of the prior related representation case in order to determine simply whether the decision there was correct, and, in the resulting unfair labor practice case declines all review. Thus, the "rule against relitigation" is in irrevocable conflict with Section 10(c) and the Congressional design.

B. The Effect of This Court's Decision in Pittsburgh Plate Glass Co. v. NLRB.

Support for the Board's "rule against litigation" derives not from the statute itself nor from persuasive legislative history, as has been shown, but it is said to result from this Court's decision in *Pittsburgh Plate Glass Co.*

v. *NLRB*, 313 U. S. 146, 157-162 (1941). Analysis of that decision reveals such a reliance to be misplaced. The central issue in that case concerned the Board's determination of "appropriate unit" which had been fully litigated in a prior representation case and which the Board declined to relitigate in a subsequent related unfair labor practice proceeding. Although this Court approved the Board's conduct in that case, its decision does not constitute governing authority here for three independent reasons. *First*, in *Pittsburgh Plate Glass* the Board had itself reviewed the evidence in the representation case so that the aggrieved party there could not allege the Board's failure to render an independent judgment on the merits of the issues in dispute:

> "Each of the points was fully covered by the evidence before the Board on the unit hearing, with the result that the Crystal City Union received a full and complete hearing on every proposition . . . If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough."

Second, at the time that *Pittsburgh Plate Glass* was decided, Congress had not yet amended Section 3(b) so that the Board had not promulgated the limited certiorari-type review of representation cases which, together with the "rule against relitigation", allegedly authorizes the Board to decline any review whatever of the merits of issues governing related unfair labor practice cases. And *third*, at the time *Pittsburgh Plate Glass* was decided, Congress had not yet enacted the APA which guarantees precisely those procedural safeguards which the application of the "rule against relitigation" eliminates.

Accordingly, reliance upon *Pittsburgh Plate Glass* in this case is inappropriate.

C. The Policy Considerations Purportedly Favoring the "Rule Against Relitigation."

The "rule against relitigation" appears to be designed to achieve two basic purposes. The vice of the rule consists, apart from the other considerations raised *infra*, that the first of these purposes can be accomplished without the rule and the relative cost of achieving the second is too great in consideration of the requirements of procedural fairness. These purposes are:

1. To discourage an employer's holding back evidence bearing on the issue of representation, thereby forcing the Board to make its initial determinations in the representation proceeding on an incomplete record, and thus increasing the risk that this determination will be erroneous, necessitating another election with an attendant waste of both administrative and judicial effort; and

2. To alleviate delay, in recognition of the fact that delay in the selection of a bargaining representative, which would inhere in a rule allowing relitigation, could constitute a barrier to accomplishing the purpose of the National Labor Relations Act "to facilitate industrial peace through encouragement of collective bargaining".

The first of these purposes would be served by limiting the record for the Board's review under Section 10(c) to that which is made in the prior representation case. The Board would be required to accord plenary de novo review but, absent special circumstances, no additional evidence would be taken in the subsequent complaint proceeding.

With respect to the second purpose of the rule, such increased expedition of the Board's processes as would result do not justify the loss of the procedural safeguards which would follow, particularly since the compromise mentioned above would achieve a substantial expedition of

the Board's processes without loss of a meaningful right to obtain independent review by the Board.

> "Congress has determined that the price of greater fairness is not too high." (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 46-7 (1950).

CONCLUSION.

For the foregoing reasons, and those set forth by the petitioners, the decision of the court below should be reversed; the application by the Board of the "rule against relitigation" should be declared impermissible and the Board should be instructed to honor the requirements of Section 10(c) of the Act in all unfair labor practice proceedings.

Respectfully submitted,

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